FILE COPY

FILED
JAN 28 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 563

MINNEAPOLIS STREET RAILWAY COMPANY,
Appellant,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., AS MAYOR OF THE CITY OF MINNEAPOLIS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN F. BONNER,
City Attorney;
PALMER B. RASMUSSON,
Assistant City Attorney,
Counsel for Appellees.

POOR COPY

BLEED THROUGH

INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Statement of issues on appeal	1
The judgment attempted to be appealed from is not final	3
No substantial federal question is presented by the attempted appeal	5

Table of Cases Cited

Baltimore v. *Baltimore Trust Company*, 166 U. S. 673	8
Detroit v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368	5
Hendrick v. *Maryland*, 235 U. S. 610	6
Illinois Central Railroad Co. v. *Illinois*, 146 U. S. 387	6
Louisville v. *Cumberland Telephone Co.*, 224 U. S. 649	5
Minneapolis v. *Street Railway Co.*, 215 U. S. 417	5
New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S. 650	6
New Orleans Public Service v. *City of New Orleans*, 281 U. S. 682	7
New York and N. E. Railroad Co. v. *Bristol*, 151 U. S. 556	6
Railway Company v. *New Orleans*, 143 U. S. 192	9
Railway Company v. *Philadelphia*, 101 U. S. 528	8
St. Louis v. *United Railways Co.*, 210 U. S. 266	9
St. Louis v. *Western Union Telegraph Co.*, 149 U. S. 465	7

Statutes Cited

Constitution of the United States:	
Article I, Section 10	2
14th Amendment	2

Page

Minnesota Statutes Annotated, Section 220.07 3
Ordinance of the City of Minneapolis of 1875, Section 9 ..... 2, 3

Ordinance of the City of Minneapolis of 1890:

Section 7 2
Section 8 2

United States Code Annotated, Title 28, Section 1257(2) 3

POOR COPY

BLEED THROUGH

IN SUPREME COURT, STATE OF MINNESOTA

Case No. 34935

MINNEAPOLIS STREET RAILWAY COMPANY,
Plaintiff-Respondent,

vs.

CITY OF MINNEAPOLIS, HUBERT H. HUMPHREY, JR., AS MAYOR OF THE CITY OF MINNEAPOLIS, CHARLES C. SWANSON, AS CITY CLERK OF CITY OF MINNEAPOLIS, GLADYS E. MILLER AS CITY TREASURER OF CITY OF MINNEAPOLIS, AND O. J. TURNER, AS CITY COMPTROLLER OF CITY OF MINNEAPOLIS, *Defendants-Appellants*

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellees in the above entitled cause and for their joint statement in opposition to appellant's statement as to jurisdiction herein, and in support of appellees' motion to dismiss or affirm, respectfully show the following:

I. Statement of Issues on Appeal

The question sought to be presented in this appeal is appellant's claim that an ordinance of the City of Minneapolis increasing the license fee for each street car operated on its public streets from that of $25.00 as fixed in appellant's

franchise ordinance in 1890, to that of $100.00 per street car as fixed by the 1946 ordinance here under attack, is contrary to and in violation of appellant's existing grants and franchise and impairs the obligation of said contract and franchise in violation of Article I, Section 10, and the Fourteenth Amendment of the Constitution of the United States. These claims the appellees deny and the State Supreme Court in the opinion and judgment here challenged determined the question so raised by appellant adversely to it. The court found that Section 9 of the 1875 ordinance provides as follows:

> "Sec. 9. The Council of the City of Minneapolis *hereby reserves the right to make all necessary and usual police regulations concerning the operation and management of said street roads* during the continuance of the rights and privileges hereby granted." (Italics supplied.)

and that Sections 7 and 8 of the 1890 Ordinance provide as follows:

> "Sec. 7. This ordinance is granted upon the express condition and requirement that said Minneapolis Street Railway Company shall pay to the City Treasurer • • • an annual tax or license fee of twenty-five dollars ($25) per car for the average number of cars operated • • •."
>
> "Sec. 8. In the construction, maintenance and operation of said lines of street railway said Minneapolis Street Railway Company, its successors and assigns, *shall at all times be subject to all the conditions and limitations and other provisions of an ordinance entitled 'An Ordinance authorizing and regulating street railways in the City of Minneapolis,' passed July 9, 1875, and approved July 17th, 1875, as the same has been amended and is now in force, and all other ordinances of said city now in force or hereafter adopted, so far as applicable.*" (Italics supplied.)

POOR COPY

BLEED THROUGH

M.S.A. 220.07 (part of the so-called Brooks-Coleman Act whereby the state legislature converted the franchise into an indeterminate permit) provides:

> "When such certificate shall be filed • • • such grant, *subject to the provisions of this chapter*, shall become an indeterminate permit to own, operate, manage, and control any street railway property, or any part thereof, within such city under the terms and conditions of the grant that shall have been theretofore made by the state or any such city and be then in force; *but all of the terms, conditions, and obligations of such existing grant, except as herein otherwise specifically provided, shall continue in force so long as such indeterminate permit shall continue.* • • • " (Italics supplied.)

Thus the City of Minneapolis retained its right to regulate by the exercise of its police power:

(1) Because such power cannot be contracted away;

(2) Because express reservation of such exercise was made in the 1875 ordinance which reservation became part of the 1890 ordinance and the Brooks-Coleman Act above quoted, and is and constitutes part of the franchise.

II. The Judgment Attempted to be Appealed from Is Not Final

The statutory provision relied on by appellant does not sustain the jurisdiction of the Supreme Court of the United States in that the decision appealed from does not constitute a final judgment or decree. 28 U. S. C. A. (Revised 1948) Chapter 81, Section 1257, Subdivision 2, reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> "• • • • •
>
> "(2) By appeal, where is drawn in question the validity of the statute of any state on the ground of its being

COPY BOUND CLOSE IN CENTER

repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

That portion of the decision by the Supreme Court of the State of Minnesota from which this appeal is attempted to be taken and as set forth in appellant's statement of jurisdiction reads as follows:

> "It follows that the enactment by the city of the 1946 ordinance for the increase of the annual license fee per car from $25 to $100—*subject, however, to a determination that such increase is necessary to defray the reasonable cost of police power measures and regulations as authorized by Sec. 220.09*—constituted a valid exercise of its police power, which did not impair any obligations of contract or work a deprivation of any property rights in violation of either the federal or state constitutions." (Italics supplied.)

The judgment involved was one on the pleadings and the italicized portion of that part o fthe decision from which this appeal is attempted to be taken clearly requires that the reasonableness of the additional fees imposed be first determined. Consequently, should the attempted increase of the license fees be held to be unjustified and unreasonable appellant's rights under its franchise could in no way be affected and no federal constitutional question would be involved. It is our contention that inasmuch as the judgment from which this appeal is attempted to be taken is conditioned upon a future determination of the reasonableness of the increase in license fees the judgment is not final within the meaning of Title 28, above referred to, so as to entitle appellant to invoke the jurisdiction of the Supreme Court of the United States.

POOR COPY

BLEED THROUGH

III. No Substantial Federal Question Is Presented by the Attempted Appeal

Appellant relies on the following cases to sustain the jurisdiction of this appeal:

Louisville v. *Cumberland Telephone Co.*, 224 U. S. 649 (1912);

Minneapolis v. *Street Railway Company*, 215 U. S. 417 (1907);

Detroit v. *Detroit Citizens Street Railway Co.*, 184 U. S. 368 (1902).

Briefly, in the *Louisville* case the state legislature granted a franchise to the Ohio Valley Telephone Company to which the defendant Cumberland Telephone Company later succeeded. The City Council of Louisville later "ratified and confirmed" the rights so granted and in 1909 the City Council repealed outright the ordinance of 1886 constituting the company's franchise. In the instant case the City of Minneapolis has merely increased the annual license fee for each street car for the use of the streets and clearly the *Louisville* case is not applicable. The other two cases involve the fixing of rates of fare, which rates were agreed upon in the original franchise and in each case the respective city council attempted to reduce the rate of fare so agreed upon.

Clearly those cases attempted to regulate the relationship between the company and its patrons rather than that between the city and the company for the use of the public streets and the manner of conducting the business and none of the cases so relied on by the appellant are applicable in the instant case.

The Supreme Court of the State of Minnesota determined that the city had ample power to pass the ordinance

COPY BOUND CLOSE IN CENTER

and that the ordinance was so passed in the exercise of the city's police power. Such power cannot be contracted away.

> "The state can no more abdicate its trust over property in which the whole people are interested, • • • than it can abdicate its police powers in the administration of government and the preservation of the peace."
> *Illinois Central Railroad* v. *Illinois*, 146 U. S. 387, 453.

> "The constitutional prohibition upon State laws impairing obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts for all property, whether owned by natural persons or corporations."
> *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 672.

> "The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. • • • And also that 'a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.' "
> *N. Y. and N. E. Railroad Co.* v. *Bristol*, 151 U. S. 556, 567, 571;
> *Hendrick* v. *Maryland*, 235 U. S. 610 (Motor vehicle license fees).

POOR COPY
BLEED THROUGH

In *New Orleans Public Service* v. *City of New Orleans*, 281 U. S. 682, the company had a franchise granted by the city for the operation of a street railway system. One of its lines was constructed along an avenue which intersected a railroad track. The railroad objected to the street railway crossing its track at grade. The city passed an ordinance directing the construction of a viaduct which the street railway company was willing to construct whereafter the company built a single track trestle viaduct. Later the city required the company to remove said viaduct and construct in its place double tracks at street level across the railroad track which the company refused. On page 686, the court said:

> "The ordinance now under consideration does not aim to destroy or to exact payment for the right of appellant to use the street for the operation of its street railway. *It purports merely to regulate the use of the streets for the convenience and safety of the public. It does not impair appellant's franchise.*" (Italics supplied.)

In *St. Louis* v. *Western Union Telegraph Company*, 149 U. S. 465, it is said on page 469:

> "The word 'regulate' is one of broad import. * * * If the city gives a right to the use of the streets or public grounds, as it did by ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used."

On Page 471:

> "The determination of the amount to be paid for the use is as much a matter of regulation as determining the place which may be used or the size or height of the poles. The very argument made by the court to show that fixing telephone charges is not a regulation of the use, is persuasive that fixing a price for the use is such a regulation."

COPY BOUND CLOSE IN CENTER

In *Baltimore* v. *Baltimore Trust Company*, 166 U. S. 673, the municipal authorities directed the street railroad company to maintain but one track on a certain street instead of the double track originally granted to the company. The court held that the change was no more than the exercise by the city of its acknowledged power to make a reasonable regulation concerning the use of the street by the company, and said on page 684:

> "If it be said in this case that the city had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition to-day and to another and additional one to-morrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously."

The case of *Railway Company* v. *Philadelphia*, 101 U. S. 528, is one very similar to the instant case. There the original franchise provided for a $30 license fee for each car and later the legislature provided that the railway company should pay to the city a license fee of $50 for each car per year. On pages 539 and 540, the court said:

> "Charters of private corporations duly accepted, it must be admitted, are in general executed contracts, but the different provisions, *unless they are clear*, unambiguous, and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as apply to other legislative grants, the universal rule being that whenever the privileges granted to such a corporation come under revision in the courts, the grant is to be strictly construed against the corporation and in favor

POOR COPY
BLEED THROUGH

of the public, and that nothing passes to the corporation but what is granted in clear and explicit terms." (Italics supplied.)

"Whatever is not unequivocally granted in such charters is taken to have been withheld, as all such charters and acts extending the privileges of corporate bodies are to be taken most strongly against the corporators."

To same effect is *Railway Company* v. *New Orleans*, 143 U. S. 192, both cases of which are followed in *St. Louis* v. *United Railways Company*, 210 U. S. 266, where the court held that the ordinances of the city of St. Louis granting rights of construction and operation to street railways do not contain any *clearly expressed obligation on the part of the city to surrender its right to impose further license fees upon the street railway cars*, and said on page 280:

> "It seems to us that this case is virtually decided by the rule laid down in *Railway Company* v. *New Orleans*, 143 U. S. 192, supra, which holds that because a street railway company has agreed to pay for the use of the streets of the city for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation."

It is respectfully submitted that the provisions of the 1890 ordinance setting the license fee at $25 and further providing that all rights thereof shall be subject to all terms and conditions of the 1875 ordinance wherein the exercise of the police power was reserved by the city, clearly reserve in the city the right of regulation by the exercise of the police power and do not constitute any surrender thereof.

We further submit that the question presented in this appeal has long ago been so definitely determined that no substantial question is presented by this appeal entitling ap-

COPY BOUND CLOSE IN CENTER

pellant to invoke the jurisdiction of the Supreme Court of the United States.

Wherefore, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Minnesota be affirmed.

JOHN F. BONNER,
City Attorney;
PALMER B. RASMUSSON,
Assistant City Attorney,
Attorneys for Appellees,
333 City Hall,
Minneapolis, Minnesota.

(6577)

POOR COPY
BLEED THROUGH
COPY BOUND CLOSE IN CENTER